1986

THE STATE OF UTAH, Plaintiff and Respondent vs . VERD J. ERICKSON, Defendant and Appellant : Brief of Appellant

Utah Supreme Court

David L. Wilkinson; Attorney General; Attorney for Respondent.
Walker E. Anderson; Attorney for Defendent.

IN THE SUPREME COURT

STATE OF UTAH

THE STATE OF UTAH, Plaintiff-Respondent vs. VERD J. ERICKSON, Defendant-Appellant.	Case No. 21055 Priority #2

APPELLANT'S BRIEF

APPEAL FROM THE JUDGMENT, SENTENCE (COMMITMENT)
OF THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH, JUDGE SCOTT DANIELS

WALKER E. ANDERSON
Attorney for Defendant-Appellant
660 South 200 East, Suite 100
Salt Lake City, Utah 84111
Telephone: 534-1035

DAVID L. WILKINSON
Utah Attorney General
Attorney for Plaintiff-Respondent
State Capitol Building, #236
Salt Lake City, Utah
Telephone: 533-5661

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Utah Attorney General
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STATEMENT OF THE KIND OF CASE

Defendant was charged with 3 Counts of unlawful distribution for value of a controlled substance to an undercover agent on May 24 and June 3, 1985, in violation of Section 58-37-8. (R 60-61) Addendum 1

Dr. Erickson plead not guilty and also alleged the affirmative defense of Entrapment, Section 76-2-303. (R 11) Addendum 2.

DISPOSITION IN THE LOWER COURT

On August 27, 1985 at the Evidentiary Hearing (R 282-355) the court heard testimony regarding defendant's Motion to Suppress all physical evidence, Suppress all statements elicited from defendant (R 16), and to Dismiss the case and action based on the defense of Entrapment, Sec. 76-2-303. (R 19) The court generally denied these Motions. See the Minute Entry (R 57-59); and Findings and Conclusions (R 64-66) Addendum 3

Defendant's Motion to Reconsider certain Findings and Conclusions and make new Findings and Conclusions (R 92-135) was denied.

The case went to jury trial. (R 356-572) At the end of the State's case, the Motion for a Directed Verdict was denied. (R 517) At the end of the trial defendant was found guilty on all 3 Counts. (R 184-186) His Motion for a New Trial was denied. (R 214) His Motion to Arrest Judgment (R 197-206) was denied, and he was sentenced. (R 210-211) Addendum 4.

Defendant appeals.

STATEMENT OF ISSUES PRESENTED ON APPEAL

I. The State did not meet its burden of proving beyond a reasonable doubt that entrapment did not occur.

II. The trial court erred in denying defendant's motion to suppress, motion to dismiss, motion for a directed verdict, motion to arrest judgment and set aside the three convictions and enter judgment of acquittal, and in sentencing defendant based upon illegal and tainted evidence.

STATEMENT OF FACTS

Dr. Erickson was born in 1936 and has been practicing dentistry since 1971. During the 12-day period involved (May 23-June 3, 1985), he had Dental Offices in Taylorsville, Salt Lake County, Utah. He is married and has children and grandchildren. Dr. Erickson had financial difficulties, and on May 17, 1985 he filed his dental business in Bankruptcy. (R 532-534; 331)

Prior to June 3, 1985, when Dr. Erickson was arrested,

he had never been charged with any felony,

had never been charged by the Dental Association,

had never been charged or reprimanded by the Board of Regulations, (R 536) and

had never been charged with selling any type of drugs (R 332).

Metro Narcotics Undercover Agent Celeste Paquette had never seen Dr. Erickson prior to May 24, 1985. (R 298; 383) Under the assumed name of Kris Gordon, she visited his Offices in Taylorsville 8 times during May 24-June 3.

The Officers testified that they had an informant (R 285; 430-432), who told them that Dr. Erickson was overprescribing or distributing pharmeceutical drugs to patients illegally.

Officer Paquette was asked, "Do you know anyone in the last 14-15 years that Dr. Erickson sold drugs to? * * * A. Other than myself, no." (R 426)

Kris Gordon called Dr. Erickson's Dental Office on May 23 requesting an appointment for a checkup. (R 286)

At no time did Dr. Erickson ever call or try to reach her.

On May 24, at about 10:30 a.m., she went to the Doctor's Office. (R 286; 357-359; 378) "Kris was acting pretty nervous and picking at her fingernails, just kind of jumping around" (R 520).

Officer Paquette testified that she had a conversation with the Doctor while in the dental chair, "I stated that I didn't have a problem with my teeth, that I just wanted to talk to the Doctor." (R 286; 359) * * * "I continued to talk to him and stated that I was--I had taken some speed in the past and that I was wondering if it was really as hazardous to your teeth or as detrimental as I had heard it would be. And again he stated that he would have to look at my teeth first. * * * He examined

my teeth. * * * " (R 286; 359)

Q. Is there some reason that you told him you didn't have any particular problems with your teeth?

A. Yeah. I really didn't want any dental work done. I wanted to see if he would sell me drugs." (R 359-360)

* * *

Q. And you didn't need any dental work?

A. That is correct.

* * *

A. My intention was to see if he would sell me narcotic drugs. (R 378)

* * *

Q. So your primary objective to go there was to buy contraband or controlled substance or Demerol or Morphine or anything you could?

A. Yes, it was.

Q. That was your primary objective, wasn't it?

A. To buy a narcotic drug.

A. To buy narcotics or any drug you could? It didn't make any difference what you were going to buy? Your mission was to buy drugs, wasn't it?

A. Yes, it was. (R 298) Also see (R 398; 402; 422-23)

* * *

Q. And so your primary purpose there was to try to buy drugs from the Doctor?

A. Yes.

Q. At any cost?

A. Pardon me?

Q. At any price, any cost?

A. Legally from my point of view to buy drugs, to make a case to buy drugs. (R. 381) (emphasis added)

On May 24, at about 10:30 a.m., when Kris Gordon first visited the Dental Office, she testified that her roommate was with her and that,

A. * * * She just came along to make it look good. * * *

Q. She came along to make it look what?

A. Look normal, just kind of prop. (R 302)

* * *

Agent Foster Mayo testified that,

A. * * * She's not here to have her teeth cleaned or have any dental repair work. * * *

Q. Is there a reason she would say something to that nature?

A. Well, the scenario that we wanted to provide is was that she was an amphetamine addict and not looking for legitimate dental work. (emphasis added)

Q. So the only reason she'd be at the Dental Office would be what?

A. To obtain a prescription or drugs outside the realm of professional services rendered by a dentist. (R 450)

* * *

The receptionist testified that Kris,

A. * * * was acting real jittery, and she had told us that she had taken a lot of speed and she was worried about the damage that it had done to her teeth. And she was picking at her fingers, and you know, she wouldn't relax her neck in the chair. And it seemed to me at that time that she was still taking drugs. (R 328)

* * *

A. * * * we thought that she was a junky and that he didn't want to have anything to do with her. (R 524-25)

After Kris Gordon's dental examination on May 24, at about 10:30 a.m., she made payment to the receptionist, and then "she walked back to the lab room and started talking to Dr. Erickson," (R 324; 337; 338)

* * *

Officer Paquette testified,

Q. Did you tell him about your taking speed?

A. Yes. * * * He asked me how many I would be taking a day. I said probably 15. (R 384)

* * *

Q. When you were there for the first appointment, did you discuss any particular drug with the Doctor?

A. The first visit? * * * I brought up the speed. (R 388)

On May 24, Kris Gordon returned to the Dental Office about 5:30 p.m. and was told by the receptionist to come back

about 7:00 p.m. (R 324-5; 525) Dr. Erickson had informed the receptionist to tell Kris Gordon to come back when he figured he would be gone. (R 339: 525) After the Office was closed and locked, about 6:00 p.m., and Dr. Erickson was at his motorcycle putting his helmet on to leave, Kris Gordon walked up. (R 527-28; 325) Dr. Erickson went back into the Office with Kris Gordon where there was a transfer to the Doctor of $60.00 and he sold her 30 pills. (R 290; 305; 554)

Officer Paquette testified that she would contact the Doctor on Friday, May 31 (R 305) and she returned to the Office about 5:00 p.m., but there were patients in the Office and she did not see the Doctor; so she returned to the Office about 6:00 p.m. and at this visit with the Doctor, they discussed her purchasing controlled substances from the Doctor for $5,000.00. (R 305-6; 343; 544-45)

Kris Gordon had an appointment on June 3 at 10:00 a.m. to get her teeth cleaned, but the receptionist had overbooked and she asked Kris Gordon to return at 2:00 p.m. (R 326; 371) She returned to the Office about 2:00 p.m. and Dr. Erickson cleaned her teeth and she paid the receptionist. (R 326-27) She testified that "he didn't want to talk about it right then, but I should return at 6:00 p.m." (R 371)

About 6:00 p.m. June 3, Kris Gordon returned to the Doctor's Office and the transaction took place, to-wit: she passed him an envelope, testifying that it contained $5,000.00 and he passed to her pills and Demerol. (R 295; 317; 372-73; 547)

After she gave her pre-arranged signals to the other Officers outside, about 8 other Officers entered the Dental Office with guns and arrested Dr. Erickson. (R 417-19; 547-48) The Officers took the envelope containing the alleged $5,000.00. (R 421; 547)

When the Doctor asked and inquired of Kris Gordon if she was a "plant," she said no. (R 310; 350; 391; 540; 547) (emphasis added)

During the 12-day period involved, May 23-June 3, 1985,

there was no arrest warrant or search warrant issued (R 311; 319), and

there was no Utah State District Court Judge Order authorizing or approving interception of the conversations between Officer Paquette and Dr. Erickson in his Office (R 307; 319), as provided by Section 77-23a-8. Addendum 6

Officer Paquette was wired-taped with a transmitter on her person and her conversations with the Doctor in his Office were being monitored outside by other Officers (R 447), to wit: May 24 at about 5:00 p.m. (R 367-68; 377), May 24 at about 6:00 p.m. (R 368; 377; 390-91), May 31 about 6:15 p.m. (R 306; 398), June 3 about 6:00 p.m. (R 312; 416).

SUMMARY OF ARGUMENT

ENTRAPMENT. The State failed to prove beyond a reasonable doubt that entrapment did not occur. The evidence proved

that defendant was entrapped. The trial court failed to follow and apply the federal and state doctrine of entrapment--the objective test doctrine.

The evidence was totally tainted by entrapment. Defendant was found guilty and sentenced based upon illegal and tainted evidence. No crime would have been committed but for the insistence and persistence of the Officers. The criminal conduct charged against the defendant was the product of the creative activity of the Officers because of their initiative, persistence, instigation, enticement, persuasion, inducement and planning for the commission of a crime. Dr. Erickson was in financial trouble, in bankruptcy, and the serpent bequiled him and he did eat, Sorrells v. U.S., 77 L.Ed. 413, rev'd. 57 F.2d 973 (4th C.A. 1932).

The trial court also erred in failing to exclude the tainted electronic surveillance evidence. No Utah State District Court Judge issued an Order authorizing or approving the interception of wire or oral communications between Dr. Erickson and Officer Paquette, Section 77-23a-8. Addendum 6 All electronic surveillance evidence should have been excluded. Section 77-23a-7. Addendum 5

There were no affidavits for search and seizure warrants and there were no search and seizure warrants at any time. Defendant's 4th Amendment and Utah Constitution, Article I, Section 14 rights were violated. Addendums 7 and 8. After the Officers had probable cause, a search and seizure warrant was required,

Harris, Coolidge, Sanders, infra; Payton v. N.Y., 445 US 573.

There was no hot pursuit and no exigent circumstances after Dr. Erickson was arrested on June 3, 1985. The controlled substances that were received by Officer Paquette were tested and testified to in court by plaintiff's witnesses without a search warrant having been issued. Defendant submits that "testing is a form of search," Lowry and Westlund, infra, and that a search warrant should have been issued prior to the testing of the controlled substances. There was no search warrant issued for the testing, therefore, this evidence was also tainted.

ARGUMENT

POINT I

THE EVIDENCE CONCLUSIVELY SHOWS THAT THE OFFICERS INTENDED TO AND DID ENTRAP DEFENDANT.

The state had the burden of proving beyond a reasonable doubt that entrapment did not occur.

The evidence proved that defendant was entrapped.

* * * "It was the government's burden to prove beyond a reasonable doubt that the defendant was not entrapped." * * * U.S. v. Silver, 457 F.2d 1217, at 1220; U.S. v. Henry, 749 F.2d 203; State v. Levsen (Iowa) 261 NW2d 471.

The evidence is legion illuminating the entrapment of

defendant. Any iota of evidence of entrapment is sufficient to find defendant not guilty. Evidence of entrapment is not weighed by the amount or quantity, or measured by degree.

Dr. Erickson was law abiding and his hands were clean. He had never been "charged" or "reprimanded" (R 536).

Defendant filed in Bankruptcy May 17, 1985 (R 331; 535). Six (6) days later on May 23, 1985, undercover Officer Paquette, using the fictitious name of Kris Gordon, called Dr. Erickson's Dental Office for an appointment for May 24. She had never seen the Doctor before (R 298). In his Office she started the conversation off by talking about "speed" (R 379). (In Kourbelas, infra, agent "Nelson brought up the subject of selling marijuana," p. 1239.) She persisted in visiting his Office 8 times during the 11-day period (May 24-June 3). She testified that she did not "need" or "want any dental work done," (R 360; 378) and that her "mission" (R 298) and "only purpose" at the Doctor's Office was to try to buy drugs from him (R 402) and from her point of view,

"to make a case to buy drugs" (R 381), (emphasis added), and that her

"intention was to see if he would sell me narcotic drugs" (R 378). (emphasis added)

The trial court erred in failing to follow and apply the federal and state doctrine of entrapment.

This Court will interfere (1) if it appears that the

trial court abused its discretion or misapplied principles of law, Rohr v. Rohr (Utah 1985) 709 P.2d 382, and (2) reverse a jury conviction for insufficient evidence, State v. Miller, 709 P.2d at 355.

The evidence clearly or conclusively establishes entrapment.

Utah adopted the objective test doctrine for determining whether a defendant has been entrapped, and the objective test looks primarily to police conduct, State v. Taylor, 599 P.2d 496; State v. Sprague, 680 P.2d 404; State v. Cripps, 692 P.2d 747.

Officer Paquette visited and persisted 8 times at the Doctor's Office. In State v. Kourbelas (Utah) 621 P.2d 1238, the agent renewed and contacted defendant at least 5 times "in attempting to purchase the marijuana," and that "there is no evidence that the defendant had previously possessed or dealt in the drug," and that it is "not a proper function of law enforcement officers, either themselves or by the use of undercover agents or decoys, to induce persons who otherwise would be law abiding into the commission of crime," p. 1240, and "there necessarily exists a reasonable doubt as to whether the offense committed was the product of the defendant's initiative and desire, or was induced by the persistent requests of Mr. Nelson"; and the defendant's conviction was reversed. (emphasis added)

In Sprague, supra, Tauffer approached defendant at

least 3 times. "The Offense was induced by the persistent requests by Tauffer, not by the initiative and desire of defendant"; and the conviction was reversed. (emphasis added)

The receptionist took Kris Gordon to the front office where payment was made for the services rendered, then Kris Gordon, "walked back to the lab room (15-18 feet) and started talking to Dr. Erickson." (R 324; 337; 344; 523) The Doctor testified, "She wanted me to write a prescription for dilaudid * * * a severe pain killer * * *" (R 338) but "I did not." She did not need or want dental work, she persisted in tempting Dr. Erickson to commit any crime.

In State v. Soroushirn (Utah) 571 P.2d 1370, "there is nothing to suggest that the appellant would ever have dealt in marijuana except at the instance of and for the benefit of the officer," and the judgment was reversed and the case remanded with instructions to find the appellant not guilty, p. 1372. There is nothing here to suggest that Dr. Erickson would ever have dealt in controlled substances, except at the request, instance, persistence, inducement and temptation by Kris Gordon at his Office. If she had stayed away from him and his Office, there would have been no crime and charges. The Officers came up "with some plan" for Officer Paquette to lure and entice Dr. Erickson (R 285; 413; 432).

"Entrapment is the seduction or improper inducement to commit a crime for the purpose of instituting a criminal prosecution, * * * " and "there is no evidence of any prior conduct

of the defendant that would have shown predisposition. There is no evidence that he was engaging in criminal activity before he took the money from the decoy. * * * the decoy simply provided the opportunity to commit a crime to anyone who succumbed to the lure of the bait * * * The defendant's acts * * * demonstrate only that he succumbed to temptation." Oliver v. State (Nev. 1985) 703 P.2d 869, at 870. (Dr. Erickson was financially stressed and in bankruptcy and he was tempted with money by Kris Gordon.) As a matter of law, "Oliver was entrapped" and the conviction was reversed. * * * "We think the activities of the officers, however well intentioned, accomplished an impermissible entrapment" * * * p. 870. (emphasis added)

The leading federal case on entrapment appears to be Sorrells v. U.S, supra, the serpent bequiled me and I did eat. Martin, a revenue-prohibition agent visited Sorrells and suggested that Sorrells sell him a half gallon of whiskey, but Sorrells replied that "he did not fool with whiskey." Martin pressed the point and one hour and several requests later, Sorrells produced the whiskey. Martin then made the arrest, which was the purpose of his visit. There was no evidence that the defendant had ever violated the liquor laws prior to the solicitation. * * * "It is clear that the evidence was sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that defendant had no

previous disposition to commit it, but was an industrious, law-abiding citizen, and that the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment * * * (emphasis added). Such a gross abuse of authority given for the purpose of detecting and punishing crime, and not for the making of criminals, deserved the severest condemnation," p. 416. Upon the evidence produced, the defense of entrapment was available and the trial court was in error in holding that as a matter of law there was no entrapment, p. 422.

In Sherman v. U.S., 2 L.Ed.2d 848, the Supreme Court reversed the judgment of conviction and remanded the case to the District Court with instructions to dismiss the indictment on the grounds that the defense of entrapment was established as a matter of law and the criminal conduct charged against the defendant was the product of the creative activity of law enforcement officials.

Here the evidence is undisputed that there was originally no intent on the part of defendant to violate the law, and (1) that the unlawful activity was induced by undercover Officer Paquette, (2) that the criminal design originated with the Officers, and was conceived in the mind of the officers, (3) that the defendant was by persuasion and inducement lured (tempted) into the commission of a criminal act by Officer Paquette.

In Taylor, supra, * * * "His conviction cannot stand

for the reason the statute condemns the conduct of the state in inducing the crime, as a perversion of the proper standards of administration of criminal law," p. 504. Dr. Erickson was not predisposed to commit the crime prior to the visit by Kris Gordon and he was an innocent person, who would not have erred, except for the persuasion of the government's agent Paquette. He lawfully had the controlled substances in his office (R 342; * * *"using a Federal order form" R 537-38).

* * * "Entrapment occurs when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce to commission in order that they may prosecute." * * * Sherman, supra.

Kris Gordon did not need or want dental work and her primary mission and sole purpose and intent was to try to buy drugs from Dr. Erickson and make a case against him.

Entrapment is a valid defense if the officers implant, manufacture, conceive, inspire, incite, devise or manipulate a person to commit a crime which he otherwise had no intention of doing. State v. McDonald (Ohio) 289 NE2d 583; People v. Bernal (Cal.) 345 P.2d 140; Lopez v. U.S., 10 L.Ed.2d 462. A line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal," Sherman, supra.

Offers of profit grossly disproportionate to what is reasonably expected in the traffic of contraband should not be permitted when they would overwhelm the self-control of a normal

person, Grossman v. State (Ala.) 457 P.2d 226. In People v. Isaacson, 406 NYS 2d 714, * * * "Even where a defense of entrapment is not made out because of the predisposition of the defendant to commit the crime, police misconduct may warrant dismissal on due process grounds." * * * (emph. added) There is a need for courts to recognize and uphold principles of due process, U.S. v. Lue, 498 F.2d 531. In Isaacson, supra, the indictment was dismissed because the court found "the manufacture and creation of crime" by the officers; and police conduct warranted a dismissal on due process grounds. An accused may be acquitted on due process grounds where the government's involvement in the crime is outrageous and reprehensible, U.S. v. Russell, 36 L.Ed.2d 366.

It is unconscionable and contrary to public policy and the established law of the land to punish a man for the commission of an offense which he never would have been guilty of if the officers had not inspired, incited, persuaded and lured him to attempt to commit, Butt v. U.S., 273 F. 35. Public policy and the law preclude judicial approval of impermissible government conduct, People v. D'Angelo, 257 NW2d 65. The fundamental rule of public policy is that the courts must be closed to the trial of crime instigated by the government's own agents. Sorrells, supra. The rule of fairness bars a conviction as a result of any improper police conduct contrary to public policy, Hampton v. U.S., 48 L.Ed.2d 113.

In Banks v. U.S., 249 F.2d 672, the court held that a claim of entrapment, if valid, would establish a violation of the due process clause of the 5th Amendment. The 4th and 5th Amendments establish independent limitations on police conduct, the breach of any one by the government, gives rise to a valid entrapment defense. It may be suggested in Johnson v. U.S., 333 US 10, that the 4th Amendment would suggest that a valid search warrant be procurred prior to the officers going to entrap the defendant. The 4th Amendment is designed to prevent, not simply to redress, unlawful police action, Steagald v. U.S., 68 L.Ed.2d 38. The state must prove beyond a reasonable doubt that a defendant knowingly and intelligently waived his 5th Amendment rights against self-incrimination, Togue v. La., 62 L.Ed.2d 622. 4th Amendment Addendum 7. 5th Amendment Addendum 9.

POINT II

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS, MOTION TO DISMISS, MOTION FOR A DIRECTED VERDICT, MOTION TO ARREST JUDGMENT AND SET ASIDE THE THREE CONVICTIONS AND ENTER JUDGMENT OF ACQUITTAL, AND IN SENTENCING DEFENDANT BASED UPON ILLEGAL AND TAINTED EVIDENCE

The trial court erred in denying defendant's (1) Motion to Suppress (R 16), (2) Motion to Dismiss (R 19), (3) Motion for a Directed Verdict (R 517), (4) Motion to Arrest Judgment and Set Aside the Three Convictions and enter Judgment of

Acquittal (R 197-206), and (5) in Sentencing defendant (R 210) based upon illegal and totally tainted evidence.

Constitutional wrongs involve both the initial police misconduct and any validation of such misconduct by a court which accepts illegally seized evidence, Mapp, infra. Government's interest cannot be confined to the stage of punishment and ignored at the stage of violation, Olmstead v. U.S., 277 US 438. Any state misconduct is sufficient to invoke the Constitution, Mapp, infra.

The trial court erred in failing to exclude and suppress the tainted electronic surveillance evidence at the Evidentiary Hearing.

The officers and the state attorneys did not apply to a Utah State District Court Judge for an Order authorizing or approving the interception of wire or oral communications between Dr. Erickson and Officer Paquette.

All conversations (and illegal transactions) between Officer Paquette and Dr. Erickson should have been excluded, Section 77-23a-7, Addendum 5, suppressed and the charges dismissed. Section 77-23a-2, Addendum 10.

Dr. Erickson knowingly consented to conversations with Kris Gordon, but not with Officer Paquette. When he asked Kris Gordon if she was a "plant," she said no, (R 310; 391; 540; 547). It was required during these dialogues for Officer Paquette to give Dr. Erickson a Miranda warning, (5th Amendment.) The

privilege against self-incrimination "serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances," Garrity v. N.J., 385 US 493.

While Kris Gordon was wired-taped with a transmitter on her person at the Dental Office, the conversations were being monitored outside by other officers and they knew that their intent, purpose and design was to try to bait Dr. Erickson to violate the law by selling Kris Gordon illegal controlled substances. Therefore, the transactions and all of the conversations, with the tapes, wires, recordings, transmissions and monitoring that were had between Dr. Erickson and Officer Paquette should have been excluded by law, Section 77-23a-7, Addendum 5.

Katz v. U.S., 19 L.Ed.2d 576, ruled that electronic eavesdropping complies with the standard of the 4th Amendment only when authorized by a neutral magistrate upon a showing of probable cause and under precise limits and appropriate safeguards, and that the fruits of such surveillance conducted without such judicial authorization are inadmissible in evidence at trial.

"It is now well settled that the 4th Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the 14th Amendment. Mapp v. Ohio, 367 US 643." * * * "The security of one's privacy against arbitrary intrusion by the police--which is at the core of the 4th Amendment--is basic to a free society," * * * Berger v. N.Y., 18 L.Ed.2d 1040, at 1049. * * * "The basic purpose of

this Amendment, as recognized in countless decisions of this court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials," * * * p. 1049. * * * The exclusionary rule has traditionally barred from trial physical, tangible material obtained either during or as a direct result of an unlawful invasion." * * * p. 1048. Here, as in Berger, at p. 1048, * * * "the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners." * * * 14th Amendment Addendum 11.

Unreasonable search and seizure
(no warrants)

The Officers testified that they had an informant. (R 285; 430-32) Therefore, they had probable cause to have a search warrant issued. The Officers at no time had arrest or search warrants. "We conclude that at the moment Knight informed the police officers where the marijuana was growing, they had probable cause to have a search warrant issued." * * * State v. Harris (Utah 1983) 671 P.2d 175, at 180, and * * * "The presence of a search warrant serves a high function and we shall not dispense of it as a mere formality." The conviction was reversed, therefore, the officers' actions must have been * * * "fatally pretextual" * * *, p. 180.

The 4th Amendment and the Utah Constitution, Article I, Section 14, both mandate against "unreasonable search and seizure."

"Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them," Miranda v. Ariz., 86 S.Ct. 1602. * * * "The 4th Amendment protects people, not places" * * * Katz, supra, p. 582. The 4th Amendment requires courts to exclude not only that which was illegally seized, but generally any other evidence (verbal or tangible) which was the direct or indirect result of an illegal search, seizure or arrest. All evidence "come at by the exploitation of illegality" may not be used against defendant, Wong Sun v. U.S., 371 U.S. 471; Mapp, supra.

The government has the burden or proving beyond a reasonable doubt that its evidence was and is free from taint, U.S. v. Wade, 388 US 218. Anything tainted which might furnish a link in the chain of evidence needed to prosecute is enough to be suppressed. Derivative evidence should all be suppressed, Nardone v. U.S., 308 US 338. Any misleading of the defendant by the officers is fatal to the evidence to be used. Bumper v. N.C., 391 US 543. Officer Paquette's only mission and purpose was to mislead Dr. Erickson with her manufactured plan to bait him into committing a crime, which he did when overwhelmed by her temptation--money, a tool of the flaming, fiery furnaces of hell when needed and desired, but not possessed.

Pressure, which the officers applied against defendant is condemned, U.S. v. Hernadez, 574 F.2d 1362. The privilege against self-incrimination extends not only to testimony, but also to evidence which would furnish a link in the chain of

evidence necessary to prosecute, Boyd v. U.S., 116 US 616; Weeks v. U.S., 232 US 383. Officer Paquette's intention (R 378) was to make a case to buy drugs from Dr. Erickson. (R 381)

If any evidence offered in fact confirms that law enforcement officers acted improperly, this, without more, justifies an Order of Suppression, Sullins v. U.S., (10th C.A.), 389 F.2d 985. * * * "An individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely on the protection of the 4th Amendment," * * * Katz, supra, p. 582. Fruits of illegal evidence are excluded, Silverthorne Lumber Co. v. U.S., 251 US 385. Because the 4th Amendment affords protection against the uninvited ear, oral arguments if illegally overheard, and their illegal fruits are all subject to suppression, Silverman v. U.S., 363 US 505. Mapp, supra, following Boyd, supra. held that the 4th Amendment, (against unreasonable searches and seizures) implemented by the self-incriminating clause of the 5th Amendment, forbids the government to convict a man of a crime by using testimony or papers obtained from him by unreasonable searches and seizures as defined in the 4th Amendment.

From the beginning with (1) the informant, (2) the officers planning to trap Dr. Erickson, (3) Officer Paquette's telephone call to defendant's Office on May 23, (4) her (Kris Gordon's) visit to his Office on May 24, and (5) without a Warrant or Court Order for electronic surveillance, totally tainted the evidence that should have been suppressed-excluded

with the charges dismissed.

Defendant was convicted and sentenced based upon illegal and totally tainted evidence.

There were no exigent circumstances and no hot pursuit at any time in this case and action.

Ark. v. Sanders, 61 L.Ed.2d 235, held the warrantless search of the suitcase to be invalid. The court reasoned that there were no exigent circumstances and that the police must have first obtained a warrant before searching the suitcase. Also, see U.S. v. Chadwick, 433 US 1; State v. Markum, 601 P.2d 975; State v. Downes, 591 P.2d 1352; State v. Groda, 591 P.2d 1354. Since the police knew of the automobile and planned all along to seize it, there were no exigent circumstances justifying their failure to obtain a valid warrant and the fruits of the unconstitutional seizure of the automobile were inadmissible. Coolidge v. N.H., 29 L.Ed.2d 564. The motion to suppress should have been granted in U.S. v. Dart, 747 F.2d 263, because the officers could not lift the blanket without a warrant. There being no hot pursuit, a search warrant is required (1) to open the suitcase, Sanders, supra, and (2) to lift the blanket, Dart, supra, therefore, (3) a search warrant is required to open the bottle of pills and (4) to open the pills for testing in this case.

After the arrest, the Officers had possession and control of the controlled substances, which were tested and testified to. (R 499) The Officers had no warrant for testing. The

officers needed a search warrant for the testing. State v. Lowry (Ore. 1983), 667 P.2d 996; State v. Westlund (Ore. 1985), 705 P.2d 208. The testing and testimony thereon is tainted and should have been suppressed.

Defendant's motion to arrest judgment should have been granted (R 197-206) as the denial was another error in law.

The army of armed officers, 8 to 10, (R 476) at the Dental Office on June 3, 1985, about 6:00 p.m., just prior to the arrest, automatically deprived Dr. Erickson of his freedom and liberty in a significant way as there was no escape for him. The officers knew the controlled substances were in the Office. They had ample time to get a warrant. There were no warrants. There were no Mirandas prior to the transaction of the controlled substances. All conversations, and the transactions, and the testing, should have been suppressed and excluded with the charges dismissed.

CONCLUSION

The Judgment, Sentence (Commitment) should be reversed and this case remanded with instructions to find defendant not guilty. Soroushirn, supra. At least, exclude all tainted evidence and dismiss all charges.

DATED February 18, 1986.

RESPECTFULLY SUBMITTED,

Walker E. Anderson

WALKER E. ANDERSON
Attorney for Defendant-Appellant

person knowingly and intentionally:

(i) to produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;

(ii) to distribute for value or possess with intent to distribute for value a controlled or counterfeit substance;

(iii) to possess a controlled substance in the course of his business as a sales representative of a manufacturer or distributor of substances enumerated in Schedules II through V except pursuant to an order or prescription;

(iv) to agree, consent, offer, or arrange to distribute or dispense a controlled substance for value or to negotiate to have a controlled substance distributed or dispensed for value and distribute, dispense, or negotiate the distribution or dispensing of any other liquid, substance, or material in lieu of the specific controlled substance so offered, agreed, consented, arranged, or negotiated.

(b) Any person who violates Subsection (1) (a) [~~of this section~~] with respect to:

(i) a substance classified in Schedules I or II [~~which is a narcotic drug~~] is, upon conviction, [~~shall be sentenced to a term of imprisonment for not more than fifteen years or pay a fine of not more than $15,000, or both.~~] guilty of a second degree felony and upon a second or subsequent conviction of any provision of Subsection (1) (a) is guilty of a first degree felony;

[~~(ii) Any other controlled substance classified in schedules I, II, or III, except marihuana, shall, upon conviction, be sentenced to a term of imprisonment for not more than ten years or pay a fine of not more than $10,000, or both.~~]

[~~(iii)~~] (ii) a substance classified in Schedule III and IV, or marihuana [~~shall~~] is, upon conviction, [~~be sentenced to a term of imprisonment for not more than five years or pay a fine of not more than $5,000, or both.~~] guilty of a third degree felony,

ADDENDUM 1

76-2-303. Entrapment.—(1) It is a defense that the actor was entrapped into committing the offense. Entrapment occurs when a law enforcement officer or a person directed by or acting in co-operation with the officer induces the commission of an offense in order to obtain evidence of the commission for prosecution by methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

(2) The defense of entrapment shall be unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening the injury to a person other than the person perpetrating the entrapment.

(3) The defense provided by this section is available even though the actor denies commission of the conduct charged to constitute the offense.

(4) Upon written motion of the defendant, the court shall hear evidence on the issue and shall determine as a matter of fact and law whether the defendant was entrapped to commit the offense. Defendant's motion shall be made at least ten days before trial except the court for good cause shown may permit a later filing.

(5) Should the court determine that the defendant was entrapped, it shall dismiss the case with prejudice, but if the court determines the defendant was not entrapped, such issue may be presented by the defendant to the jury at trial. Any order by the court dismissing a case based on entrapment shall be appealable by the state.

(6) In any hearing before a judge or jury where the defense of entrapment is an issue, past offenses of the defendant shall not be admitted except that in a trial where the defendant testifies he may be asked of his past convictions for felonies and any testimony given by the defendant at a hearing on entrapment may be used to impeach his testimony at trial.

T. L. "TED" CANNON
Salt Lake County Attorney
DAVID S. WALSH
Deputy County Attorney
231 East 400 South, Third Floor
Salt Lake City, Utah 84111
Telephone: 363-7900

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	)	FINDINGS & CONCLUSIONS ON MOTIONS TO SUPPRESS &
Plaintiff,	)	TO DISMISS
v.	)	
VERD J. ERICKSEN,	)	Criminal No. CR 85-763 Judge Scott Daniels
Defendant.	)	

The above-entitled case came on regularly for hearing on August 27, 1985 upon Defendant's Motion to Suppress all physical evidence seized in the course of the investigation, also to suppress all statements elicited from the defendant, and to dismiss the case on the defense of entrapment. The plaintiff being represented by David S. Walsh, Deputy County Attorney, and the defendant being present and represented by his attorney Walker Anderson, and the Court having taken evidence and heard argument by counsel concerning their respective positions and being fully advised in the premises

hereby enters the following:

FINDINGS

1. The electronic surveillance in this case was not a "search" and does not violate the Fourth Amendment. See Hoffa v. United States, 385 U.S. 293 (1966). Any conversations had between the defendant and Ms. Paquette are not excludable. Any of the drugs seized or taken are not suppressed.

2. The State failed to carry its burden to show consent for the search or that the search was within the limits of a search pursuant to an arrest. Accordingly, the office files will be surpressed.

3. The State failed to carry its burden of proof to show that any statements made after the arrest were made voluntarily and after waiver of right to remain silent. Therefore, any statement made by Dr. Ericksen in résponse to a question will be surpressed.

4. The conduct of the officer, objectively viewed, does not rise to the level of entrapment. The Court finds that the police merely provided the defendant with an opportunity to commit an offense. They did not induce the

commission of an offense in order to obtain evidence for purposes of a prosecution of one who was not otherwise ready to commit it.

CONCLUSIONS

1. Any evidence taken, received by officer Paquette is not suppressed and is admissible as against the defendant.

2. The files or other documents seized by the police or their agents after the arrest of the defendant is suppressed.

3. The statements of the defendant to the police after the arrest, if given in response to the questions of the police are suppressed.

4. As a matter of law, the defendant was not entrapped and the case will not be dismissed on that basis.

Dated this 18 day of September, 1985.

BY THE COURT

S/ _____
Judge SCOTT DANIELS
District Court Judge

Approved as to form:

_____
WALKER E. ANDERSON
Attorney for the Defendant

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

vs.

Vera J. Erickson,

Defendant.

JUDGMENT, SENTENCE
(COMMITMENT)

Case No. CR-85-763
Count No. ____
Honorable S. Daniels
Clerk K. Busch
Reporter S. Sprouse
Bailiff J. Foster
Date 11-22-85

☐ The motion of _____ to enter a judgment of conviction for the next lower category of offense and impose sentence accordingly is ☐ granted ☐ denied. There being no legal or other reason why sentence should not be imposed, and defendant having been convicted by ☑ a jury; ☐ the court; ☐ plea of guilty; ☐ plea of no contest; of the offense of Unlaw. Dist. for Value a Cont. Sub, a felony of the 2nd degree, ☐ a class ____ misdemeanor, being now present in court and ready for sentence and represented by W. Anderson, and the State being represented by K. Knight-Egan, is now adjudged guilty of the above offense, is now sentenced to a term in the Utah State Prison:

☐ to a maximum mandatory term of _____ years and which may be for life;
☐ not to exceed five years;
☑ of not less than one year nor more than fifteen years;
☐ of not less than five years and which may be for life;
☐ not to exceed _____ years;
☐ and ordered to pay a fine in the amount of $_____,
☐ and ordered to pay restitution in the amount of $_____ to _____

☐ such sentence is to run concurrently with _____
☐ such sentence is to run consecutively with _____
☐ upon motion of ☐ State, ☐ Defense, ☐ Court, Count(s) _____ are hereby dismissed.
☐ _____
☑ Defendant is granted a stay of the above (☐ prison) sentence and placed on probation in the custody of this Court and under the supervision of the Chief Agent, Utah State Department of Adult Parole for the period of _____, pursuant to the attached conditions of probation.
☐ Defendant is remanded into the custody of the Sheriff of Salt Lake County ☐ for delivery to the Utah State Prison, Draper, Utah, or ☐ for delivery to the Salt Lake County Jail, where defendant shall be confined and imprisoned in accordance with this Judgment and Commitment.
☐ Commitment shall issue _____

DATED this 22 day of Nov., 19 85.

APPROVED AS TO FORM:

Scott Daniels
DISTRICT COURT JUDGE

ATTEST
H. DIXON HINDLEY
Clerk
By Karen Busch
Deputy Clerk

_____
Defense Counsel

_____
Deputy County Attorney

CR-85-763

CONDITIONS OF PROBATION

Judge's Initials

_____ ☑ Usual and ordinary conditions required by the Department of Adult Probation and Parole.

_____ ☑ Serve 3 DAYS in the Salt Lake County Jail commencing to be set in Dec., 1985.

_____ ☐ Pay a fine in the amount of $ _____ ☐ at a rate to be determined by the Department of Adult Probation and Parole; or ☐ at a rate of _____

_____ ☑ Pay restitution in the amount of $ 60.00 ; or ☐ in an amount to be determined by the Department of Adult Probation and Parole. within 30 DAYS; ordered in Int. of Just.

_____ ☐ Enter, participate in, and complete any _____ program, counseling, or treatment as directed by the Department of Adult Probation and Parole.

_____ ☐ Enter, participate in, and complete the _____ program at _____.

_____ ☑ Submit person, residence, and vehicle to search and seizure for the detection of drugs.

_____ ☑ Submit to drug testing.

_____ ☑ Not associate with anyone who illegally uses, sells, or otherwise distributes narcotics or drugs.

_____ ☑ Not frequent any place where drugs are used, sold, or otherwise distributed illegally.

_____ ☑ Not use or possess non-prescribed controlled substances.

_____ ☐ Refrain from the use of alcoholic beverages.

_____ ☐ Submit to testing for alcohol use.

_____ ☐ Take antabuse ☐ as directed by the Department of Adult Probation and Parole.

_____ ☐ Obtain and maintain full-time employment.

_____ ☐ Obtain and maintain full-time employment or full-time schooling.

_____ ☐ Maintain full-time employment or obtain and maintain full-time schooling.

_____ ☐ Participate in and complete any ☐ educational, and/or ☐ vocational training ☐ as directed by the Department of Adult Probation and Parole, or with ☐ _____.

_____ ☐ Participate in and complete any _____ training. ☐ as directed by the Department of Adult Probation and Parole, or with ☐ _____.

_____ ☐ Defendant is to have no contact nor associate with _____.

_____ ☐ Defendant's probation may be transferred to _____ under the Interstate Compact as approved by the Department of Adult Probation and Parole.

_____ ☑ Complete 450 hours of community service as directed by the Department of Adult Probation and Parole.

_____ ☐ Complete _____ hours of community service in lieu of _____ days in jail.

_____ ☐ Defendant is to commit no crimes.

_____ ☐ Defendant is ordered to appear before this Court on _____ for a review of this sentence.

_____ ☐ _____

_____ ☐ _____

_____ ☐ _____

_____ ☐ _____

DATED this 22 day of Nov., 19 85

_____
DISTRICT COURT JUDGE

ATTEST
H. DIXON HINDLEY
Clerk
By _____

77-23a-7. Evidence — Exclusionary rule. Whenever any wire or oral communication has been intercepted, no part of the contents of the communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof, if the disclosure of that information would be in violation of this chapter.

History: C. 1953, 77-23a-7, enacted by L. 1980, ch. 15, § 2.

Collateral References.
22A CJS Criminal Law § 657(24).
29 AmJur 2d 489, Evidence § 433.

77-23a-8. Order authorizing or approving interception. The attorney general of the State of Utah, or any assistant attorney general specially designated by the attorney general or any county attorney or any deputy county attorney specially designated by the county attorney, may authorize an application to a Utah State district court judge of competent jurisdiction for, and the judge may grant in conformity with the procedures for interception of wire or oral communications by any law enforcement agency of this state or any political subdivisions having responsibility for the investigation of the type of offense regarding which the application is made, an order authorizing or approving the interception of a wire or oral communication by any law enforcement agency of this state or any political subdivision having responsibility for investigation of the offense as to which the application is made, when the interception sought may provide or has provided evidence of:

(1) Any crime punishable by death or imprisonment for more than one year in the Utah state prison;

(2) A violation of the Utah Controlled Substances Act, chapter 37, title 58; or

(3) Any conspiracy to commit any of the crimes named in this section.

ADDENDUMS 5 and 6

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ADDENDUM 7

CONSTITUTION OF UTAH ART. I, § 14

Sec. 14. [Unreasonable searches forbidden—Issuance of warrant.]

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

ADDENDUM 8

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ADDENDUM 9

77-23a-2. Legislative findings. The legislature finds and determines that:

(1) Wire communications are normally conducted through facilities which form part of an interstate network. The same facilities are used for interstate and intrastate communications.

(2) In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of intrastate commerce, it is necessary for the legislature to define the circumstances and conditions under which the interception of wire and oral communications may be authorized and to prohibit any unauthorized interception of these communications and the use of the contents thereof in evidence in courts and administrative proceedings.

(3) Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.

(4) To safeguard the privacy of innocent persons, the interception of wire or oral communications when none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurance that the interception is justified and that the information obtained thereby will not be misused.

ADDENDUM 10

AMENDMENT XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CERTIFICATE OF SERVICE

I certify that 4 copies were hand-delivered to The Attorney General's Office, The Capitol, Salt Lake City, Utah, this February 18, 1986.

Walker E. Anderson

Walker E. Anderson